United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rules Enabling Act, 28 U.S.C. § 2072

§ 2072. RULES OF CIVIL PROCEDURE.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. (June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 103, 63 Stat. 104; July 18, 1949, ch. 343, § 2, 63 Stat. 446; May 10, 1950, ch. 174, § 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub. L. 89-773, § 1, 80 Stat. 1323.)

28 U.S.C. § 2106

§ 2106. DETERMINATION.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. (June 25, 1948, ch. 646, 62 Stat. 963.)

Section 19, Securities Exchange Act of 1934, 15 U.S.C. § 78s

§ 78s. POWERS WITH RESPECT TO EXCHANGES AND SECURITIES

(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this chapter or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such trans-

action any provision of this chapter or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours

of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MORTON EISEN, on behalf of himself and all other purchasers and sellers of "odd-lots" on the New York Stock Exchange similarly situated,

Plaintiff,

—against—

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an unincorporated association,

Defendants.

PLAINTIFF DEMANDS JURY TRIAL

Plaintiff, by his attorneys, Laventhall & Zicklin, Esqs., complaining of defendants on behalf of himself and all other purchasers and sellers of "odd-lots" on the defendant New York Stock Exchange, similarly situated, alleges:

AS A FIRST CAUSE OF ACTION AGAINST DEFENDANTS CARLISLE & JACQUELIN, AND DECOPPET & DOREMUS:

1. That this first cause of action arises under the Sherman Antitrust Act, § 1, 15 U.S.C. § 1.

2. That the jurisdiction of this Court is based upon the Clayton Antitrust Act, § 4, 15 U.S.C. § 15.

3. That at all times herein mentioned defendant New York Stock Exchange was and still is an unincorporated association which constitutes, maintains and provides a market place and facilities for bringing together purchasers and sellers of securities and for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood; said defendant New York Stock Exchange is registered as a national. . . .

Advisory Committee's Note to Rule 23

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the *res judicata* effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L. Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had

considerable difficulty with these terms. See, *e.g.*, *Gullo* v. *Veterans' Coop H. Assn.*, 13 F.R.D. 11 (D.D.C. 1952); *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F.Supp. 870 (W.D. Pa. 1947); *Deckert* v. *Independence Shares Corp.*, 27 F. Supp. 763 (E.D. Pa. 1939, *rev'd*, 108 F.2d 51 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F.Supp. 592 (E.D. Pa. 1941), *rev'd sub nom. Pennsylvania Co. for Ins. on Lives* v. *Deckert*, 123 F.2d 979 (3d Cir. 1941) (see Chafee, *supra*, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, *e.g.*, *System Federation No. 91* v. *Reed*, 180 F.2d 991 (6th Cir. 1950); *Wilson* v. *City of Paducah*, 100 F. Supp. 116 (W.D. Ky. 1951); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D. Ill. 1951); *National Hairdressers' & C. Assn.* v. *Philad Co.*, 34 F.Supp. 264 (D.Del. 1940); 41 F.Supp. 701 (D.Del. 1940), *aff'd mem.*, 129 F.2d 1020 (3d Cir. 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, *e.g.*, *Knapp* v. *Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954), *aff'd*, 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del. 1949); *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd*

on grounds not here relevant, 326 U.S. 99 (1945) (see Chafee, *supra*, at 208); *cf. Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 320 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945). But *cf.* the early decisions, *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; *Sheffield Waterworks* v. *Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown* v. *Vermuden*, 1 Ch. Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice* ¶¶23.10[1], 23.12 (2d ed. 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); but *cf. P. W. Husserl, Inc.* v. *Newman*, 25 F.R.D. 264 (S.D.N.Y. 1960); *Athas* v. *Day*, 161 F.Supp. 916 (D.Colo. 1958). On ancillary intervention, see *Amen* v. *Black*, 234 F.2d 12 (10th Cir. 1956), *cert. granted*, 352 U.S. 888 (1956), *dism. on stip.*, 355 U.S. 600 (1958); but *cf. Wagner* v. *Kemper*, 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c) (1) below.

Advisory Committee's Note to Rule 23

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, *supra*, at 230-31; Keeffe, Levy & Donovan, *supra; Developments in the Law, supra*, 71 Harv.L.Rev. at 937-38; Note, *Binding Effect of Class Actions*, 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ. P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions

Subdivision (*a*) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder or the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* §562, at 265, §572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See *e.g.*, *Giordano* v. *Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir. 1950); *Zachman* v.

Erwin, 186 F.Supp. 681 (S.D.Tex.1959); *Baim & Blank, Inc.* v. *Warren-Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y. 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b) (1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a) (2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 *Colum.L.Rev.* 1254, 1259-60 (1961); *cf.* 3 Moore, *supra*, ¶23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to

act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist.* v. *Looney*, 219 F.2d 529 (9th Cir. 1955); *Rank* v. *Krug*, 142 F. Supp. 1, 154-59 (S.D.Calif.1956), *on app., State of California* v. *Rank*, 293 F.2d 340, 348 (9th Cir. 1961); *Gart* v. *Cole*, 263 F.2d 244 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959); *cf. Martinez* v. *Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir. 1955); 3 Moore, *supra*, ¶23.11 [2], at 3458-59.

Clause (*B*): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been

possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); *Waybright* v. *Columbian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn. 1939); *cf. Smith* v. *Swormstedt*, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim See *Knapp* v. *Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954), *aff'd*, 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway, Corp.*, 81 F.Supp. 957 (D. Del.1949); *Zahn* v. *Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461 (D.Del.1951); *Sobel* v. *Whittier Corp.*, 95 F.Supp. 643 (E.D.Mich.1951), *app.dism.*, 195 F.2d 361 (6th Cir. 1952); *Goldberg* v. *Whittier Corp.*, 111 F.Supp. 382 (E.D. Mich.1953); *Dann* v. *Studebaker-Packard Corp.*, 288 F. 2d 201 (6th Cir. 1961); *Edgerton* v. *Armour & Co.*, 94 F. Supp. 549 (S.D.Calif.1950); *Ames* v. *Mengel Co.*, 190 F.2d 344 (2d Cir. 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries,

and which requires an accounting or like measures to restore the subject of the trust. See *Bosenberg* v. *Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir. 1942); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *cf. York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. *Cf. Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952); 3 Moore, *supra*, at ¶23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan* v. *Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); *cf. City & County of San Francisco* v. *Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed

duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. *Cf. United States* v. *Paramount Pictures, Inc.*, 66 F.Supp. 323, 341-46 (S.D.N.Y. 1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (*b*)(*2*). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir.

1963), *cert. denied*, 377 U.S. 972 (1964); *Brunson* v. *Board of Trustees of School District No. 1, Clarendon Cty., S. C.*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963); *Green* v. *School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd.* v. *Bush*, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 354 U.S. 921 (1957); *Mannings* v. *Board of Public Inst. of Hillsborough County, Fla.* 277 F.2d 370 (5th Cir. 1960); *Northcross* v. *Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962); *Frasier* v. *Board of Trustees of Univ. of N. C.*, 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), *aff'd*, 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those

cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. *Cf.* Chafee, *supra*, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer* v. *F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller* v. *National City Bank of N. Y.*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes* v. *Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In

these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R. R.* v. *United States*, 111 F.Supp. 80 (D.N.J. 1953); *cf.* Weinstein, *supra*, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif. 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b) (3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, *supra*, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties

ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b) (3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland* v. *Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chafee, *supra*, at 273-75, regarding policy of Fair Labor Standards Act of 1938, §16(b), 29 U.S.C. §216(b), prior to amendment by Portal-to-Portal Act of 1947 §5(a). [The present provisions of 29 U.S.C. §216(b) are not intended to be affected by Rule 23, as amended.] In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c) (2) below, of the right of members to be excluded from the class upon their request.)

Advisory Committee's Note to Rule 23

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c) (1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d) (4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference

to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d) (2).

Subdivision (c) (2) makes special provision for class actions maintained under subdivision (b) (3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b) (3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d) (2) below.)

Subdivision (c) (3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b) (1) or (b) (2), those found by the court to be class members; in a class action under subdivision (b) (3), those to whom the notice prescribed by subdivision (c) (2) was directed, excepting

those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b) (1) or (b) (2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b) (3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c) (4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, *supra*, ¶23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), *pet. cert. dism.*, 371 U.S. 801 (1963); *York* v. *Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on grounds not here relevant*, 326 U.S. 99 (1945); *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 856 (3d

Cir. 1945); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del. 1951); *State Wholesale Grocers* v. *Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv Stat. Assn.* v. *Shell Pet. Corp.*, 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver* v. *Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D. Tenn.1941); Kalven & Rosenfield, *supra*, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); *Developments in the Law*, *supra*, 71 Harv.L.Rev. at 935; 2 Barron & Holtzhoff, *supra*, §568; but *cf. Lockwood* v. *Hercules Powder Co.*, 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976-77 (S.D. Calif.1942); Chafee, *supra*, at 280, 285; 3 Moore, *supra*, ¶23.12, at 3476. Under proposed subdivision (c) (3), one-way intervention is excluded; the action will have been early determined to be a class or non-class action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c) (3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* §86, comment (h), §116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, *supra*, at 284; Weinstein, *supra*, 9 Buffalo L.Rev. at 460.

Advisory Committee's Note to Rule 23

Subdivision (*c*) (*4*). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (*d*) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d) (1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d) (2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D. Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (¶62869); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to im-

prove the representation of the class. *Cf. Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

Subdivision (d) (2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d) (2) may be particularly useful and advisable in certain class actions maintained under subdivision (b) (3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c) (2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b) (3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c) (2), together with any discretionary notice which the court may find it advisable to give under subdivision (d) (2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *cf. Dickinson* v. *Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n. 4; see also *All American Airways, Inc.* v. *Elderd*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart* v. *Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the

particular purpose but needed not comply with the formalities for service of process. See Chafee, *supra*, at 230-31; *Brendle* v. *Smith*, 7 F.R.D. 119 (S.D.N.Y. 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner* v. *Transitron Electronic Corp.*, 201 F. Supp. 934 (D.Mass. 1962); *Hormel* v. *United States*, 17 F.R.D. 303 (S.D.N.Y. 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, *e.g.*, on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (*e*) requires approval of the court, after notice, for the dismissal or compromise of any class action.

Order Granting Petition for Rehearing *In Banc*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1054

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

v.

CARTE BLANCHE CORPORATION,

Appellant

PRESENT: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges*.

ORDER

The Petition for Rehearing filed by defendant-appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the Circuit in regular active service, and a majority of such active circuit judges having voted for rehearing en banc,

IT IS ORDERED that the Petition for Rehearing en banc is granted, the judgment of this court dated May 22, 1973, is vacated, and the Clerk of this court shall list this appeal

for rehearing or reconsideration before the court en banc at the convenience of the court.

BY THE COURT:—

VAN DUSEN
Circuit Judge

Dated: June 20, 1973

RECEIVED & FILED
JUN 20, 1973
THOMAS F. QUINN
Clerk